

Exhibit 4

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1 Volume 1
2 Pages 1-51
3 UNITED STATES DISTRICT COURT
4 FOR THE DISTRICT OF COLUMBIA
5 Civil Division
6 Civil Action Number 03-CV-01798 (EGS)

7
8 THERESA M. OWENS,
9 Plaintiff,

10
11 vs.
12
13 ELI LILLY AND COMPANY,
14 Defendant.

15
16 *****
17
18 DEPOSITION of MERLE BERGER, M.D.
19 Boston IVF
20 One Brookline Place
21 Brookline, Massachusetts
22 Wednesday, November 9, 2005
23 10:35 a.m.
24

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1 uterus?

2 A. Yes.

3 Q. Doctor, your letter to Mr. Levine

4 summarizes your opinion, the one in June 2003, and

5 you said "It was and is my impression that DES

6 exposure in utero was the sole cause of this

7 couple's primary infertility." Now, Doctor, back in

8 1993 was it your view then that DES was the cause of

9 this couple's infertility?

10 A. Yes.

11 Q. Is that something, Doctor, that you told

12 this couple -- that DES was --

13 MR. LEVINE: I object. He did not say

14 that and it is missing from both the letter of

15 June 21st and June --

16 MR. DILLON: You may object, but I'm

17 asking the Doctor a question at deposition.

18 MR. LEVINE: You are asking questions

19 based on an assumption of false facts because the

20 word "DES" is specifically and conspicuously absent

21 from those two letters.

22 MR. DILLON: I can read the letters, I

23 think, as well as you can, Mr. Levine, so I think if

24 you would just make an objection by saying the word

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1 "objection," you can then ask any questions of

2 Dr. Berger you like after we're done.

3 Q. Doctor, going back having Mr. Levine now

4 expound on his views of the facts, going back it was

5 your view back in 1993 that DES was the cause of

6 this couple's infertility; is that correct?

7 A. Yes.

8 Q. Is that for the same reasons that you've

9 described now about the uterine malformation and

10 potential unknown mechanisms in the uterus as well?

11 A. Yes.

12 Q. Doctor, did you, in fact tell

13 Mr. and Mrs. Owens when you saw them that your view

14 was that their problem had its root in DES?

15 A. That I can't recall -- exactly the words I

16 used and what I told them, no.

17 Q. Certainly, if they had asked you in 1993

18 what you thought was the root of their infertility

19 cause, you would have told them your view that it

20 was DES; isn't that right?

21 A. Yes.

22 Q. Doctor, obviously you have a lot of

23 experience with patients with infertility. Is it

24 your practice to be candid with your patients about

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1 your concerns or your views about the capacity of

2 Mrs. Owens' uterus to carry a pregnancy; is that

3 correct?

4 A. Yes.

5 Q. And that, in your view, was due to in utero

6 exposure to DES; is that right?

7 A. Yes.

8 Q. So if, in fact, the Owenses had asked any

9 questions about why a surrogate or a gestational

10 carrier was necessary, would you have told them that

11 it was due to the fact that she had a DES uterus?

12 A. I might have, yes.

13 Q. If they had asked why Mrs. Owens had a

14 small and unusual uterus, I take it you would have

15 shared your view that it was due to in utero

16 exposure to DES?

17 A. Absolutely.

18 Q. Doctor, I don't have any further

19 questions.

20 CROSS-EXAMINATION

21 BY MR. LEVINE:

22 Q. This is Mr. Levine, and I have a couple of

23 questions for you. Based on your comprehensive

24 review of this woman's history, her tests, her